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COURT OF APPEALS
STATE OF NEW YORK

1 No. 96 .

CITY OF NEW YORK,

Respondent,

—v.—

JOB-LOT PUSHCART, *et al.*,

Defendants,

JA-RU,

Appellant.

FREDERICK B. LOCKER, *for appellant.*
GEORGE GUTWIRTH, *for respondent.*

OPINION

CIPARICK, J.:

Since 1955, New York City has outlawed the sale, possession or use of any toy or imitation gun which substantially resembles an actual firearm because of the toy's potential for nefarious exploitation (*see*, Administrative Code of City of NY § 10-131[g]; Proc of NYC Council, at 24 [Jan 18, 1955]). Only toy guns that are not blue, black, silver or aluminum in color, bear an identifiable trade name or mark, and contain a solid plug in the barrel can be sold, possessed or used in New

York City (*see*, Administrative Code § 10-131[g]). At issue is whether these conditions are preempted by the 1988 Federal Toy Gun Law. We conclude that Congress has not expressly or impliedly preempted local regulation of the markings on toy guns and that the conditions set forth in Administrative Code § 10-131(g) are not incompatible or inconsistent with those provided in the Federal Toy Gun Law in that compliance with both is not impossible. Indeed, compliance with the Administrative Code conditions furthers the public safety aim of the federal statute. Therefore, we affirm the order of the Appellate Division and answer the certified question in the affirmative.

I.

The City instituted this action against defendants, entities that place toy guns into the New York City stream of commerce, to permanently enjoin the manufacture, distribution, transportation, sale and possession of toy weapons in violation of Administrative Code § 10-131(g). Evidently, the toy guns confiscated from defendants duplicate the semi-automatic assault pistols frequently used in the commission of crimes, are black in color, and do not bear any mark identifying the manufacturer. In opposition to plaintiff's order to show cause seeking a preliminary injunction, defendant-appellant JA-RU, Inc., a national distributor and marketer of toy guns, moved for a declaration that Administrative Code § 10-131(g) was preempted by the Federal Toy Gun Law (15 USC § 5001) and its implementing regulations (15 CFR § 1150, et seq) (collectively, the Federal Toy Gun Law), arguing that the City's action contravened the federal statute regulating toy weapons. Ja-Ru represented that it distributes toy guns that comply with the markings approved by the Secretary of Commerce, which require that the toy contain a "permanently affixed blaze orange plug inserted in the barrel recessed no more than 6 millimeters from the muzzle end" (15 CFR § 1150.3[a]).

Supreme Court preliminarily enjoined defendants from selling and distributing toy guns in violation of Administrative Code § 10-131(g), and denied Ja-Ru's motion by declaring that Administrative Code § 10-131(g) is not preempted by 15 USC 5001. The Appellate Division affirmed, with two Justices dissenting (*see, City of New York v Job-Lot Pushcart et al*, 213 AD2d 210), and certified to us the question, "Was the order of Supreme Court, as affirmed by this Court, properly made?"

On this appeal, Ja-Ru strenuously argues that Congress's intent to preempt all state and local laws relating to toy guns is plain on the face of 15 USC § 5001(g). According to Ja-Ru, Congress delineated a comprehensive scheme of identification and markings that cannot be superseded by a different state or local scheme. Because Administrative Code § 10-131(g) prohibits what is permitted under the Federal Toy Gun Law, Ja-Ru asserts, the Administrative Code provision is inconsistent with the Federal Toy Gun Law. Ja-Ru posits that preemption of the incompatible City law comports with "one of the [federal statute's] essential purposes . . . a uniform scheme of national regulation." We disagree.

II.

The premise of Ja-Ru's argument is the well-settled rule that the Supremacy Clause of the United States Constitution (US Const, art VI, cl 2) invalidates State or local laws that "interfere with or are contrary to" Federal law (*Gibbons v Ogden*, 22 US 1, 211). However, the conclusion urged by Ja-Ru—that the Federal Toy Gun Law preempts Administrative Code § 10-131(g)—does not result from an application of traditional preemption principles but from the economic impact on Ja-Ru as a result of the ban on the distribution of its toy guns in New York City.

The threshold issue in the preemption analysis is whether the subject Federal legislation intrudes on traditional police powers reserved to the States (*see, Cipollone v Liggett Group Inc.*, 505 US 504, 516). Historically, the regulation of health,

safety and welfare has been the province of the States (*see, Toy Mfrs of America, Inc. v Blumenthal*, 986 F2d 615, 617). The United States Supreme Court has decreed that unless Congress manifestly and clearly intends to preempt the States' exercise of jurisdiction over matters relating to the welfare of their citizens, the States' police powers are not to be superseded by a Federal Act (*see, Rice v Santa Fe Elevator Corp*, 331 US 218, 230; *see also, Fidelity Fed Sav & Loan Assn v De la Cuesta*, 458 US 141, 152-153; *United Auto, Aircraft and Agr Implement Workers of America v Wisconsin Empl Rel Bd*, 351 US 266, 274-275 ["States are the natural guardians of the public against violence . . . We would not interpret an act of Congress to leave them powerless to avert . . . emergencies without compelling directions to that effect"]; *Florida Lime and Avocado Growers, Inc. v Paul*, 373 US 132, 146-147; NY Const, art IX, § 2[c][ii]). Therefore, the "purpose of Congress is the ultimate touchstone of preemption analysis" (*Retail Clerks Int'l Assn, Local 1625 v Schermerhorn*, 375 US 96, 103).

Because it is uncontroverted that Administrative Code § 10-131(g) represents a valid exercise of the police powers delegated to the City by the State Constitution and the Municipal Home Rule provisions (*see, People v Judiz*, 38 NY2d 529, 531), the efficacy of the City ordinance turns on whether Congress has preempted all State and local regulation of toy guns pursuant to 15 USC § 5001(g) (*see, Florida Lime and Avocado Growers, Inc v Paul*, 373 US, at 42, *supra*; *see also, Consolidated Edison Co of NY, Inc v Town of Red Hook*, 60 NY2d 99, 107; *People v DeJesus*, 54 NY2d 465, 468; *People v Lewis*, 295 NY 42, 49-50).

As we summarized in *People v Pymm*, 76 NY2d 511, 519, *cert denied sub nom, Pymm v NY*, 498 US 1085, there are three ways in which a Federal law can preempt a State or local law: one, by express provision in the Federal statute; two, by inference, where the Federal legislative scheme is so pervasive and the character of the obligations imposed leaves no room for the State or local government to legislate; and three, to the extent that the State or local law actually conflicts with the Federal law, for example where compliance

with both is impossible or adherence to the State or local law would thwart the objectives of its Federal counterpart ([internal citations omitted]; *see also, Barnett Bank of Marion Co, N.A. v Nelson*, __ US __, 64 USLW 4161, 4162-4163).

We turn first to a consideration of the specific language of preemption employed by Congress in the Federal Toy Gun Law.

A.

The preemption provision in the Federal Toy Gun Law provides that

> The provisions of this section shall supersede any provision of State or local laws or ordinances which provide for markings or identification inconsistent with provisions of this section provided that no State shall
>
> (i) prohibit the sale or manufacture of any look-alike, nonfiring, collector replica of an antique firearm developed prior to 1898, or
>
> (ii) prohibit the sale (other than prohibiting the sale to minors) of traditional B-B, paint ball, or pellet-firing air guns that expel a projectile through the force of air pressure.

(15 USC § 5001[g]).

The sweep of the Federal Toy Gun Law's preemption clause is not as far-reaching as Ja-Ru and the dissenters below contend by urging that the statutory language explicitly preempts the field and ends the inquiry (*see, City of New York v Job-Lot Pushcart Inc*, 213 AD2d, at 213, *supra*). Rather, the plain language employed by Congress demonstrates that only State regulation of replicas of antique collector firearms, B-B guns, paint ball guns, or pellet-firing air guns is expressly preempted under 15 USC § 5001(g), which bars any State from prohibiting the sale of such devices, and with respect to antique replicas of pre-1898 firearms, the manufacture of such devices (*see*, 15 USC § 5001[g][i] and [ii];

Coalition of New Jersey Sportsmen v Florio, 744 F Supp 602, 608-609).

The clearly defined reach of this provision compels the conclusion that Congress did not intend to supersede all local regulation of markings on toy guns. Where "Congress has considered the issue of preemption and has included . . . a provision explicitly addressing that issue . . 'there is no need to infer congressional intent to preempt [other] state laws from the substantive provisions of the legislation.' . . . Congress' enactment of a provision defining the preemptive reach of a statute implies that matters beyond that reach are not preempted" (*Cipollone v Liggett Group, Inc.*, 505 US, at 517, *supra* [internal citation omitted]; *see also*, *Vatore v Commn of Consumer Affairs of the City of NY*, 83 NY2d 645, 650). Similarly, when we considered whether a State environmental statute superseded a town ordinance on the same subject, we rejected the proposition that the "mere fact that the State deals with a subject [means] it automatically preempts it" (*Monroe-Livingston Sanitary Landfill Inc. v Town of Caledonia*, 51 NY2d 679, 683; *see also*, *People v Lewis*, 295 NY, at 50, *supra*).

The limited scope of the preemption clause is confirmed by the comments of the legislation's sponsor, Senator Robert Dole, made during the Senate debate that "[a]t the suggestion of the California Senators, the preemption section has been modified to accommodate the new California law" (134 Cong Rec S15531, 15534 [daily ed. Oct 6, 1988]). The very fact that the preemption clause in the federal statute was modified before adoption, to permit a recently enacted California statute to stand, constitutes an explicit acknowledgment of the validity of State regulatory measures and provides compelling evidence that Congress was not impliedly imposing a pervasive, preemptive regulatory scheme. Ja-Ru's assertion, then, that the essential purpose of the Federal Toy Gun Law is to promote a "uniform system of national regulation" rings hollow. This contention is further undermined when Ja-Ru's true intention—the unimpeded flow of toy guns through interstate markets—is juxtaposed against the actual goal of the Federal Toy Gun Law—guarding the public safety, which was

also the motivating objective for the City Council's adoption of Administrative Code § 10-131(g) in 1955 (*see*, 134 Cong Rec, at S15534, *supra*, [statement of Sen Dole that the purpose of his amendment was to "allow continued production, sale and distribution of toy guns, while at the same time reducing the potential for misuse as much as possible . . . [as] a few incidents have actually occurred to date involving the criminal misuse of toy or imitation guns . . ."]; 134 Cong Rec H10071 [daily ed. Oct 12, 1988] [statement of Rep Moorhead, same as above]; Proc of Council of NYC, at 24, *supra*). However laudable a national public safety campaign regulating the sale and use of realistic toy guns may be, it remains that Congress did not enact the Federal Toy Gun Law to supplant all State and local measures. The issue then narrows to whether the conditions set forth in Administrative Code § 10-131(g) "provide for markings or identification inconsistent with the provisions" of the Federal Toy Gun Law to the extent that there is "such actual conflict between the two schemes of regulation that both cannot stand in the same area" (*Florida Lime and Avocado Growers, Inc. v Paul*, 373 US at, 142-143, *supra*).

B.

On the State level, "inconsistency 'has been found where local laws prohibit what would have been permissible under State law or impose prerequisite additional restrictions' on rights under State law, so as to inhibit the operation of the State's general laws" (*New York State Club Assn, Inc. v City of New York*, 69 NY2d 211, 217 *affd* 487 US 1, *quoting. FTB Realty Corp. v Goodman*, 300 NY 140, 147-148 [internal citations omitted]; *see also, Florida Lime and Avocado Growers Inc. v Paul*, 373 US, at 143, *supra*; *Vatore v Commn of Consumer Affairs of the City of NY*, 83 NY2d, at 649, *supra; Monroe-Livingston Sanitary Landfill, Inc. v Town of Caledonia*, 51 NY2d, at 682, *supra*). Likewise, where Congress has not expressed an intent to supersede all State or local regulation in a field, a State or local law will be preempted if it

is impossible to comply with both the local and Federal law (*see, Florida Lime Avocado Growers, Inc. v Paul, supra*, 373 US, at 142-143), or the State or local law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress (*see, Hines v Davidowitz*, 312 US 52, 67; *Barnett Bank of Marion Co, N.A. v Nelson*, 64 USLW, at 4163, *supra*).

The Federal Toy Gun Law only supersedes State or local laws that "provide for markings or identification inconsistent with" its terms. The additional conditions imposed by Administrative Code § 10-131(g) do not conflict with the conditions enumerated in the Federal Toy Gun Law. As the Appellate Division noted "it is feasible to make a red or purple toy gun [which bears the manufacturer's trade name and contains] an orange [plug], satisfying both laws" (*City of New York v Job-Lot Pushcart*, 213 AD2d, at 210, *supra*). Therefore, it is not impossible to comply with both the Federal Toy Gun Law and Administrative Code § 10-131(g). That the sale of Ja-Ru's toy guns is only illegal under the terms of the local provision is not a basis for preemption of the City law, as the dissenters below opine, because "this general principle applies only where the Legislature has shown its intent to preempt the field" (*Vatore v Commn of Consumer Affairs of NYC*, 83 NY2d, at 651, *supra*). Indeed, compliance with both the Federal and local laws at once furthers the intent of Congress and achieves the public safety objective underlying each measure. The Federal Toy Gun Law seeks to impose some regulatory guidelines, in part, to override local laws that completely banned toy guns from certain jurisdictions (*see*, 57 Fed Reg 48,451 [1992] [codified at 15 CFR § 1150 et seq]; 134 Cong Rec, at S15534, *supra*). In response to these local bans, the Hobby and Toy Industry of America and the Toy Manufacturers of America pressed Congressional members for passage of the Federal Toy Gun Law, which incorporates markings voluntarily adopted by the industry (*see*, 134 Cong Rec, at S15534, *supra*). Against this backdrop, the Federal Toy Gun Law is not an attempt to dominate the field. States and localities can erect a regulatory framework that expands upon the Federal foundation, and to the extent that Administrative Code § 10-131(g) complements the Federal Toy Gun

Law, the City's regulatory conditions can co-exist with the federal statute.

Accordingly, the order of the Appellate Division should be affirmed, with costs, and the certified question answered in the affirmative.

* * *

Order affirmed, with costs, and certified question answered in the affirmative. Opinion by Judge Ciparick. Chief Judge Kaye and Judges Simons, Titone, Bellacosa, Smith and Levine concur.

Decided May 7, 1996

ORDER GRANTING LEAVE TO APPEAL

At a Term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on September 26, 1995

Present—Hon. Francis T. Murphy, Presiding Justice
Betty Weinberg Ellerin
Israel Rubin
Milton L. Williams, Justices

M-3288
Index No. 407282/93

CITY OF NEW YORK,

Plaintiff-Respondent,

—against—

JOB-LOT PUSHCART, *et al.*,

Defendants,

JA-RU,

Defendant-Appellant.

The above-named defendant-appellant, having moved for leave to appeal to the Court of Appeals from the decision and order of this Court entered on March 14, 1995 (Appeal No. 53255),

Now, upon reading and filing the papers with respect to the motions, and due deliberation having been had thereon,

It is ordered that the motion be and the same hereby is granted insofar as to grant leave to appeal to the Court of Appeals, and this Court, pursuant to CPLR 5713, certifies that the following question of law, decisive of the correctness of its determination, has arisen, which in its opinion ought to be reviewed by the Court of Appeals:

> "Was the order of the Supreme Court, as affirmed by this Court, properly made?"

This Court further certifies that its determination was made as a matter of law and not in the exercise of discretion.

ENTER:

/s/ CATHERINE O'HAGAN WOLFE
Catherine O'Hagan Wolfe
Clerk

APPELLATE DIVISION, SUPREME COURT
FIRST DEPARTMENT

March 14, 1995

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Murphy, P.J., Rosenberger, Ellerin, Rubin, Williams, JJ.

53255

CITY OF NEW YORK,

Plaintiff-Respondent, G. Gutwirth

—against—

JOB-LOT PUSHCART, *et al.*,

Defendants,

JA-RU,

Defendant-Appellant, F.B. Locker

Order, Supreme Court, New York County (Alice Schlesinger, J.), entered on or about April 12, 1994, which, *inter alia*, granted plaintiff's motion for a preliminary injunction against defendant JA-RU, enjoining it from violating New York City Administrative Code § 10-131 (g), affirmed, without costs.

The IAS court properly found that Administrative § 10-131(g), which, *inter alia*, governs the sale, possession, manufacturing, distributing and transporting of toys or imitation

pistols or revolvers, was not preempted by 15 USC § 5001, and Federal regulations 15 CFR part 1150, which also governs, *inter alia*, the manufacture, shipping, and transport of any toy, look-alike and imitation firearms.

Consideration of issues arising under the Supremacy Clause of the US Constitution (Art. VI) "start[s] with the assumption that the historic police powers of the States were not to be superseded by Federal Act unless that was the clear and manifest purpose of Congress" (*Rice v Santa Fe Elev. Corp.*, 331 US 218, 230). "In the absence of an express congressional command, state law is pre-empted if that law actually conflicts with federal law . . . ". (*Cipollone v Liggett Group*, 112 S Ct 2608, 2617). A conflict occurs either because "compliance with both federal and state regulations is a physical impossibility" (*Florida Lime & Avocado Growers, Inc. v. Paul*, 373 US 132 142-143), or because the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" *Hines v Davidowitz*, 312 US 52, 67). Here, rather than being inconsistent, the code complements the Federal statute inasmuch as both statutes may be satisfied simultaneously. In this regard, defendant argues that the Federal statute allows what the Administrative Code prohibits, namely, the sale of black, blue, silver or aluminum guns, provided they contain the required blaze orange plug or blaze orange band markings prescribed by the federal regulations. However, it is feasible to make a red or purple toy gun with an orange band, thus satisfying both laws. Defendant also claims that the Federal statute expressly provides for a blaze orange plug or a band marking on the barrel of the toy, recessed no more than 6 millimeters from the muzzle end of such barrel (15 USC 5001[b][1]), while the Administrative Code requires that the barrel of such guns "be closed with the same material of which the gun is made for a distance of not less than $^1/_2$" from the front of said barrel. It gives an example that "if a plastic blaze orange plug is inserted in a metal toy gun, it would be violative of the Code on its face." However, a toy gun with a closed barrel and an orange blaze band, made in a color other than those prohibited by the Administrative Code, would also satisfy both laws.

As defendant concedes, the Federal statute allows for a "blaze orange band" around the perimeter of the gun barrel on function water or light-emitting guns in lieu of plugging in the barrel in its entirety. Moreover, as the I.A.S. court properly found, the purpose of the Federal statute and Administrative Code are the same: to prevent the sale of toy guns so closely copied from actual weapons as not to be readily discernible as toys, which plaintiff has shown have been utilized in the commission of violent crimes.

Accordingly, the court properly found that plaintiff was likely to prevail in its effort to enforce the Administrative Code against defendant. In addition, its conclusion that irreparable harm would occur without the injunction, based on the role toys guns play in the commission of crimes, and its determination that the equities balance in plaintiff's favor, on the grounds that the City has a right to protect its citizenry, was well founded.

We have reviewed defendant's other claims and find them to be without merit.

All concur except Rosenberger, J. and Rubin, J. who dissent in a memorandum by Rubin, J., as follows:

RUBIN, J., dissenting.

At issue on this appeal is whether a section of the New York City Administrative Code that regulates the sale, possession and use of toy guns (§ 10-131[g]) is preempted by federal legislation entitled "Penalties for Entering Into Commerce of Imitation Firearms" (enacting 15 USC § 5001; *Coalition of New Jersey Sportsmen v Florio*, 744 F Supp 602, 607). The Administrative Code provision, enacted into law in 1955, makes it unlawful "to sell or offer for sale, possess or use or attempt to use or give away, any toy or imitation pistol or revolver which substantially duplicates an actual pistol or revolver, unless said imitation or toy pistol or revolver shall be colored in colors other than black, blue, silver or

aluminum, and further provided that the barrel of said toy or imitation pistol or revolver shall be closed with the same material of which the toy or imitation pistol or revolver is made for a distance of not less than one half inch from the front end of said barrel" (§ 10-131[g]). The Administrative Code also requires "the name of the manufacturer or some trade name, mark or brand by which the manufacturer can be readily identified" to be stamped legibly on the item.

Plaintiff brought this action seeking to permanently enjoin defendants from continuing to violate Administrative Code § 10-131(g) and from maintaining what it contends is a common law nuisance. Supreme Court granted a motion by plaintiff to preliminarily enjoin defendants from distributing the toy guns which, according to plaintiff's brief, are "entirely black in color * * * except for one orange piece at the tip" and fail to carry "any stamp bearing the name of the manufacturer, trade name or brand". Defendants assert, however, and plaintiff does not deny, that the toys are in full compliance with federal legislation governing their coloring and markings.

In 1988, Congress enacted 15 USC § 5001, providing detailed requirements regarding the appearance of non-functional firearms. Insofar as pertinent to the facts of this case, the law prohibits "any person to manufacture, enter into commerce, ship, transport, or receive any toy, look-alike, or imitation firearm" without a "blaze orange plug inserted in the barrel * * * recessed no more than 6 millimeters from the muzzle end of the barrel of such firearm" (15 USC § 5001[a]; [b]). The statute contains a provision captioned "Preemption of State or local laws or ordinances; exceptions", which states: "The provisions of this section shall supersede any provision of State or local laws or ordinances which provide for markings or identification inconsistent with provisions of this section provided that no State shall—(i) prohibit the sale or manufacture of any look-alike, nonfiring, collector replica of an antique firearm developed prior to 1898, or (ii) prohibit the sale (other than prohibiting the sale to minors) of traditional B-B, paint ball, or pellet-firing air guns

that expel a projectile through the force of air pressure" (15 USC 5001[g]).

It is apparent from even a cursory examination of the Administrative Code provision that its requirements for the marking and identification of toy firearms are inconsistent with those contained in the federal statute. It is also hard to imagine a more specific expression of Congressional intent than the preemption of local ordinances that "provide for markings or identification inconsistent with the provisions of this section" (15 USC § 5001[g]). Undeterred by either the obvious inconsistency or the intent of Congress, Supreme Court held that the Administrative Code provision is not inconsistent with federal law because "making a toy gun, red or purple, or yellow or green and putting a manufacturer's label on it could simultaneously be done by a manufacturer together with the assertion of an orange plug, that is if the manufacturer wanted his products sold in the New York City market."

It is irrelevant that a manufacturer might be able to comply with the requirements of both federal and local legislation. As this Court has noted, preemption involves a two-tiered analysis, the first element of which is "whether Congress has indicated the intent to preclude State regulation of the activities" addressed in its enactment (*People v Calandra*, 164 AD2d 638, 641, *lv denied* 77 NY2d 992). Here, the intent of Congress to supersede local legislation regulating the appearance of toy guns is apparent from the face of the statute. In attempting to limit the scope of preemption, Supreme Court relies on cases dealing with implicit, not express, preemption that are inapposite under the circumstances presented by this matter (*see*, *Cipollone v Liggett Group*, __ US __, 112 S Ct 2608; *Florida Lime and Avocado Growers v Paul*, 374 US 858).

In this case, analysis does not proceed to the second tier, which is that, "irrespective of any intent by Congress to exclude State regulation, 'a state statute is void to the extent that it actually conflicts with a valid federal statute' " (*People v Calandra*, *supra*, at 643, quoting *Ray v Atlantic Richfield Co.*, 435 US 151, 158). But, even at this level, the

reasoning employed by Supreme Court is flawed. In deciding if there is an actual conflict, the material consideration is not whether a defendant may be able to simultaneously comply with the requirements of the respective enactments, but that "conduct which is lawful under the Federal statute may be illegal under State law", thereby rendering the local provision a nullity (*id.*). Here, it is not contended that the toy guns placed into commerce by defendants violate the provisions of 15 USC § 5001, only that they violate the provisions of the Administrative Code. Even if the intent to preempt local laws had not been expressly stated by Congress, defendants' sale of the toys is only illegal under the terms of the local provision, and it is therefore superseded by the federal legislation.

The only case interpreting 15 USC § 5001 brought to this Court's attention is *Coalition of New Jersey Sportsmen v Florio* (744 F Supp 602, *supra*). That decision merely applies the statutory bar against state laws prohibiting the sale of "traditional B-B, paint ball, or pellet-firing air guns" (15 USC 5001[g][ii]) which are specifically exempted from its operation. As interpreted by Commerce Department regulations, the statute applies to "toy, look-alike, and imitation firearms" resembling weapons produced since 1898 and does not apply to "(a) Non-firing collector replica antique firearms * * * (b) Traditional B-B, paint-ball, or pellet-firing air guns * * * and (c) Decorative ornamental, and miniature objects" that resemble firearms (15 CFR § 1150.1).

In construing the intent of Congress, Supreme Court misapprehends the language of the preemption provision. By limiting the local ordinances superseded to those that "provide for markings or identification inconsistent with provisions of this section", the statute does not render preemption of local measures that purport to regulate the *appearance* of a toy gun less than absolute. The limitation merely gives the locality the latitude to regulate *other* aspects of the sale of toy guns, and their sale could presumably be banned altogether. However, the locality is absolutely precluded from enforcing regulations, such as those contained in the Administrative Code provision, that bear on such aspects of the toy's design as

its color, its markings and the specifications of the muzzle plug.

It was an abuse of discretion to grant plaintiff's motion for a preliminary injunction. It is well settled that the grant of preliminary relief requires the movant to demonstrate a likelihood of ultimate success on the merits, immediate irreparable injury in the event the relief sought is denied and a preponderance of the equities to effect substantial justice and preserve the status quo (*W.T. Grant Co. v Srogi*, 52 NY2d 496, 517). In view of the explicit preemption provision of the federal statute and the obvious inconsistency between its provisions and those of the Administrative Code, plaintiff failed to demonstrate a likelihood of success on the merits. In addition, plaintiff failed to establish that irreparable injury was immediate. While there is certainly the potential for commission of a crime with a toy that closely resembles an operable weapon, the loss of sales to defendants from the imposition of the injunction is both real and immediate. As Supreme Court acknowledged in its memorandum decision, plaintiff's efforts in exacting defendants' compliance with Administrative Code § 10-131(g) resulted in a loss of sales during the 1933 holiday season, and that impact has now extended through the 1994 holiday period.

It is unfortunate that an innocuous object such as a toy gun can be an instrument of violence and even death. In the dark, even a crude imitation of a gun can employed to commit robbery. The victim of such a ruse may assume the weapon is real and shoot and kill the robber. Police responding to the report of a crime in progress, suddenly confronted with a child carrying a toy weapon, may make the same mistake with tragic consequences to all concerned. However, Congress has weighed the opposing factors of commerce and public safety and enacted a statute encompassing its determination of the competing policy considerations. The enactment is obviously less than a perfect solution to the problem it is designed to alleviate. It is, however, "the supreme law of the land" (US Constitution, Art VI, cl 2), and conflicting state law is "without effect" (*Cipollone v Liggett Group*, *supra*, at 2617).

Accordingly, the order of Supreme Court, New York County (Alice Schlesinger, J.), entered on or about April 12, 1994, which granted plaintiff City of New York's motion for a preliminary injunction, should be reversed and the motion denied, without costs.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MARCH 14, 1995

/s/ CATHERINE O'HAGAN WOLFE
Catherine O'Hagan Wolfe
CLERK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

Index No. 407282/93

CITY OF NEW YORK,

Plaintiff,

—against—

JOBLOT PUSHCART, JA-RU, WEBER JOB LOT CORPORATION AND MADISON LIMITED,

Defendants.

SCHLESINGER, J.

New York City wants to rid the town of toy look alike guns and believes they should be able to do that via enforcement of a provision of the New York City Administrative Code

In December of this past year, it moved to enjoin several manufacturers and sellers from distributing toy guns in the City which it claimed violated Code Section 10-131(g).

That Code provides in relevant part that it is:

> "unlawful for any person to sell or offer for sale, possess or use or attempt to use or give away, any toy or imitation pistol or revolver which substantially duplicates an actual pistol or revolver, unless said imitation or toy pistol or revolver shall be colored in colors other than black, blue, silver or aluminum . . . " Further, the Code requires: that "every such toy or imitation pistol or revolver hereinafter manufactured, distributed, transported or sold shall have legibly stamped thereon, the name of the manufacturer or some trade name, mark or

brand by which the manufacturer can be readily identified."

The retail distributors, who were included in the action, cooperated with the City's efforts and agreed to remove from their shelves all toys not in compliance with the Code. Because of their actions, fewer such guns were sold during the holiday season lessening, to some extent, the volume of such look alike weapons in the hands of minors and others, some of whom were using these guns in the commission of violent crimes.[1]

JA-RU is a manufacturer of toy guns and distributor of them nationally. Its products include an item which the city alleges violates the Administrative Code. JA-RU, however contends that their toy gun, specifically, a "KG-9" has a blaze orange plug recessed no more than 6 millimeters from the nuzzle end of the barrel, and that this plug brings its product into compliance with a relevant federal law, 15 U.S.C. Section 5001(b)(1) which was enacted in 1988. That statute, counsel for JA-RU argues clearly and expressly preempts the New York City Code and thus would compel this court to deny the plaintiff any injunction vis-a-vis their client.

15 U.S.C. Section 5001 reads in relevant part:

(a) *ACTS PROHIBITED*

It shall be unlawful for any person to manufacture, enter into commerce, ship, transport or receive any toy, look-alike, or imitation firearm unless such firearm contains, or has affixed to it, a marking approved by the Secretary of Commerce, as provided in subsection (b).

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[1] An accompanying affidavit from NYC Police Sergeant Dominic Buccigrossi assigned to the Department's Ballistic Squad contained the data that in the past two years, over 2,000 toy guns were confiscated and in 1992-1993 these toys were used in the commission of numerous serious crimes, including rape, assault and robbery. Further that the NYPD has accumulated statistics relating to the use of toy guns in crime and that during the period from January 1, 1992 through June 30, 1993 the Department recovered 263 toy guns used or possessed during felonious assaults and 195 used in robberies.

(b) *DISTINCTIVE MARKING FOR TOYS, LOOK-ALIKES, AND IMITATION FIREARMS, EXCEPTION, WAIVER, ADJUSTMENTS AND CHANGES*

(1) Except as provided in paragraph (2) or (3), each toy, look-alike, or imitation firearm shall have as an integral part, permanently affixed, a blaze orange plug asserted in the barrel of such toy, look-alike, or imitation firearm. Such plug shall be recessed no more than 6 millimeters from the nuzzle end of the barrel of such firearm.

(2) The Secretary of Commerce may provide for an alternate marking or devise for any toy, look-alike, or imitation firearm not capable of being marked as provided in paragraph (1) and may waive the requirement of any such marking or device for any toy, look-alike or imitation firearm that will only be used in the theatrical, movie or television industry.

(3) The Secretary is authorized to make adjustments and changes in the marking system provided for by this section, after consulting with interested persons.

(C) *LOOK-ALIKE FIREARM DEFINED*

For the purpose of this section, the term "look-alike firearm" means any imitation of any original firearm which was manufactured, designed and produced since 1898, including and limited to toy guns, water guns, replica non-guns, and air-soft guns firing non-metallic projectiles. Such term does not include any look-alike, non-firing, collector replica of an antique firearm developed prior to 1898, or traditional B-B, paint ball or pellet-firing air guns that expel a projectile through the force of air pressure.

(g) *PREEMPTION OF STATE OR LOCAL LAWS OR ORDINANCES, EXCEPTIONS*

The provisions of this section shall supersede any provision of State or local laws or ordinances which provide for marking or identification inconsistent with provisions of this section provided that no state shall

(i) prohibit the sale or manufacture of any lookalike, non-firing, collector replica of an antique firearm developed prior to 1898, or

(ii) prohibit the sale (other than prohibiting the sale to minors) of traditional B-B paint-ball, or pellet-firing air guns that expel a projectile through the force of air pressure."

Federal regulations under 15 C.F.R. Section 1150.1-1150.5 were then promulgated putting into effect the above statute.

As to certain legal principles relevant to this discussion, there should be no dispute. First, that Article VI of the United State Constitution provides that the laws of the United States "shall be the Supreme Law of the Land; . . . any thing in the Constitution or Laws of any state to the contrary notwithstanding".

Pursuant to this clause and decisions going back to the early 1800's, it is clear that when state law and federal law conflict, it is the state law that must give way.

However, hand-in-hand with the supremacy doctrine is the assumption "that the historic police powers of the states are not to be superseded by Federal Act unless that is the clear and manifest purpose of Congress" *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

Finally, in light of the strong presumption against preemption of state laws, the courts are obliged to narrowly construe the precise language of federal statutes to determine whether the State or local law is in fact preempted. *Cipollone v. Liggett Group, Inc.*, 112 S. Court 2608 (1992).

In applying these principles to the two laws here involved, I find that the City's Administrative Code, Section 10-131(g) is not in conflict with the Federal law nor did the Congress, by enacting 15 USC Section 5001 intend to preempt the field of toy gun regulation.

In the various opinions cited by the parties, the courts have struck down State and local laws, as preemptive of State regulatory power only when it was persuasively shown "either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained" *Florida Lime and Avocado Growers, Inc. v. Paul*, 83 S. Ct. 1210, 1217 (1993).

Neither is the case here. Section 5001(g) entitled "Preemption of State or Local Laws or Ordinances; Exceptions", the clause pointed to by JA-RU to support their argument of explicit preemption does not compel such a conclusion.

Rather, the words used express the mandate that the statute only supersedes State or local laws when the latter provide for markings which are "inconsistent". Also there are two exceptions or absolute prohibitions affecting specific kinds of firearms (collectors replicas of antiques and traditional B-B, and other pellet-firing air guns).

In fact, in the only reported decision specifically interpreting Section 5001, a United States District Court in New Jersey struck down a New Jersey statute finding that it was in conflict with and thereby preempted by the federal law, Section 5001(g) to the extent that the state sought to regulate B-B, paint-ball or pellet firing air guns which was explicitly precluded (*Coalition of New Jersey Sportsmen v. Florio* 744 F. Supp 602 (1990)).

Are the provisions of the New York City Administrative Code therefore, inconsistent with Federal law? I find that they are not. First, it is clear that the purpose of both the Federal Statute and the City Code are similar in that both seek to prevent the marketing of toy guns which can be confused with real guns.

The defendant may argue that the purpose of the federal statute is larger than this and includes Congressional desire to put in place a scheme so comprehensive so as to displace all state regulations. However, no where in the statute itself, is that intent expressed.

That is quite different from the policy statements actually inserted, for example in the 1965 and 1969 Federal Statutes regulating cigarette labelling discussed in *Cipollone v. Liggett Group, Inc.* (*supra*). There, Section 2 of the 1965 Act explicitly declared the statute's two purposes: 1) to adequately inform the public that cigarette smoking may be hazardous to health and 2) to protect the national economy from the burden imposed by diverse, nonuniform and confusing cigarette labeling and advertising regulations.

Still, despite this clearly declared purpose, the 1965 Statute's Section 5(b)'s words of preemption were given a narrow construction by the Supreme Court. It found that the warning to cigarette buyers required in the Act's Section 4 did not "by its own effect foreclose additional obligations imposed under state law" (pg. 2618). The 1969 statute however contained more inclusive language which the court interpreted to preempt State causes of action. However, the court emphasized it was the explicit words of preemption which counted even when the intent was clearly expressed.

Here, despite some comments and opinions expressed by various Senators who were sponsoring the federal legislation, the Congress elected not to declare its intent. And when the Statute specifically addressed preemption as to non-antique or B-B type guns, the Congress merely limited it to those State and local laws "inconsistent with the provisions".

If New York City precluded toy guns from having any plugs at all or required the plugs to be in a color other than bright orange, that would be inconsistent. In other words a manufacturer could not make his product simultaneously comply with both regulations.

However, making a toy gun, red or purple, or yellow or green and putting a manufacturer's label on it could simultaneously be done by a manufacturer together with the insertion of an orange plug, that is if the manufacturer wanted his products sold in the New York City market. (*See for example*, in this regard the extended discussion of California's law regulating avocados found in *Florida Lime and Avocado Growers, Inc. v. Paul, supra*).

In considering whether to grant a preliminary injunction, a court must consider three factors: 1) the movant's likelihood of success on the merits; 2) whether irreparable harm may occur in the absence of such an injunction, and 3) whether the equities balance in the plaintiff's favor (see, *W.T. Grant v. Srogi*, 52 NY2d 496 (1981).

Here I find that the City meets all three criteria. Based on the earlier discussion, I find that the relevant Administrative Code is viable despite the Federal Statute. Therefore, it is

likely that the City will prevail in its efforts to enforce the Code against JA-RU.

Second, I find that in the absence of an injunction, additional people living and visiting this City will be victimized by individuals using these toy guns to facilitate their commission of violent crimes. These toys, after they were confiscated by City officers, were displayed in court. They were chillingly convincing in their resemblance to real automatic weapons particularly when, with comparative ease, their orange plugs were covered by black adhesive.

Do the equities balance in the plaintiff's favor? Absolutely. A toy gun manufacturer has a right to seek out the lucrative marketplace of New York City but not at the expense and peril of the innocent people living here. If children in this City must play with toy guns, then New York has a right to make sure they appear to be precisely that.

For all the above reasons, the preliminary injunction requested by the City is granted and JA-RU's motion to declare Administrative Code Section 10-131(g) preempted by 15 U.S.C. Section 5001 is denied.

The foregoing decision constitutes the order of the court.

Dated: April 12, 1994

/s/ ALICE SCHLESINGER
Alice Schlesinger
J.S.C.

CHAPTER 76—IMITATION FIREARMS

Sec. 5001. Penalties for entering into commerce of imitation firearms.

(a) Acts prohibited.
(b) Distinctive marking for toys, look-alikes, and imitation firearms, exception; waiver; adjustments and changes.
(c) "Look-alike firearm" defined.
(d) Study of criminal misuse of toy, look-alike, and imitation firearms; report.
(c)[1] Technical evaluation of marking systems.
(f) Effective date.
(g) Preemption of State or local laws or ordinances; exceptions.

§ 5001. Penalties for entering into commerce of imitation firearms

(a) Acts prohibited

It shall be unlawful for any person to manufacture, enter into commerce, ship, transport, or receive any toy, look-alike, or imitation firearm unless such firearm contains, or has affixed to it, a marking approved by the Secretary of Commerce, as provided in subsection (b) of this section.

(b) Distinctive markings for toys, look-alikes, and imitation firearms; exception; waiver; adjustments and changes

(1) Except as provided in paragraph (2) or (3), each toy, look-alike, or imitation firearm shall have as an integral part, permanently affixed, a blaze orange plug inserted in the barrel of such toy, look-alike, or imitation firearm. Such plug shall be recessed no more than 6 millimeters from the muzzle end of the barrel of such firearm.

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[1] So in original.

(2) The Secretary of Commerce may provide for an alternate marking or device for any toy, look-alike, or imitation firearm not capable of being marked as provided in paragraph (1) and may waive the requirement of any such marking or device for any toy, look-alike, or imitation firearm that will only be used in the theatrical, movie or television industry.

(3) The Secretary is authorized to make adjustments and changes in the marking system provided for by this section, after consulting with interested persons.

(c) "Look-alike firearms" defined

For purposes of this section, the term "look-alike firearm" means any imitation of any original firearm which was manufactured, designed, and produced since 1898, including and limited to toy guns, water guns, replica nonguns, and air-soft guns firing nonmetallic projectiles. Such term does not include any look-alike, nonfiring, collector replica of an antique firearm developed prior to 1898, or traditional B-B, paint-ball, or pellet-firing air guns that expel a projectile through the force of air pressure.

(d) Study of criminal misuse of toy, look-alike, and imitation firearms; report

The Director of the Bureau of Justice Statistics is authorized and directed to conduct a study of the criminal misuse of toy, look-alike and imitation firearms, including studying police reports of such incidences and shall report on such incidences relative to marked and unmarked firearms.

(c)[1] Technical evaluation of marking systems

The Director of National Institute of Justice is authorized and directed to conduct a technical evaluation of the marking systems provided for in subsection (b) of this section to determine their effectiveness in police combat situations. The Director shall begin the study within 3 months after Novem-

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[1] So in original. Probably should be "(e)".

ber 5, 1988 and such study shall be completed within 9 months after November 5, 1988.

(f) Effective date

This section shall become effective on the date 6 months after November 5, 1988 and shall apply to toy, look-alike, and imitation firearms manufactured or entered into commerce November 5, 1988.

(g) Preemption of State or local laws or ordinances; exceptions

The provisions of this section shall supersede any provision of State or local laws or ordinances which provide for markings or identification inconsistent with provisions of this section provided that no State shall—

(i) prohibit the sale or manufacture of any look-alike, nonfiring, collector replica of an antique firearm developed prior to 1898, or

(ii) prohibit the sale (other than prohibiting the sale to minors) of traditional B-B, paint ball, or pellet-firing air guns that expel a projectile through the force of air pressure.

(Pub.L. 100-615, § 4, Nov. 5, 1988, 102 Stat. 3190.)

Effective Date

Section effective 6 months after Nov. 5, 1988, applicable to toy, look-alike, and imitation firearms manufactured or entered into commerce after that date, see subsec. (f) of this section.

CODE OF FEDERAL REGULATIONS

TITLE 15—COMMERCE AND FOREIGN TRADE

SUBTITLE B—REGULATIONS RELATING TO COMMERCE AND FOREIGN TRADE

CHAPTER XI—TECHNOLOGY ADMINISTRATION, DEPARTMENT OF COMMERCE

PART 1150—MARKING OF TOY, LOOK-ALIKE AND IMITATION FIREARMS

s 1150.1 Applicability.

This part applies to toy, look-alike, and imitation firearms ("devices") having the appearance, shape, and/or configuration of a firearm and produced or manufactured and entered into commerce on or after May 5, 1989, including devices modelled on real firearms manufactured, designed, and produced since 1898. This part does not apply to:

(a) Non-firing collector replica antique firearms, which look authentic and may be a scale model but are not intended as toys modelled on real firearms designed, manufactured, and produced prior to 1898;

(b) Traditional B-B, paint-ball, or pellet-firing air guns that expel a projectile through the force of compressed air, compressed gas or mechanical spring action, orials standard F 589-85, Standard Consumer Safety Specification for Non-Powder Guns, June 28, 1985. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from the American Society for Testing and Materials, 1916 Race Street, Philadelphia, PA 19103. Copies may be inspected at the office of the Associate Director for Industry and Standards, National Institute for Standards and Technology, Gaithersburg, Maryland, or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC; and

(c) Decorative, ornamental, and miniature objects having the appearance, shape and/or configuration of a firearm, including those intended to be displayed on a desk or worn on bracelets, necklaces, key chains, and so on, provided that the objects measure no more than thirty-eight (38) millimeters in height by seventy (70) millimeters in length, the length measurement excluding any gun stock length measurement.

[57 FR 48453, Oct. 26, 1992]

s 1150.2 Prohibitions.

No person shall manufacture, enter into commerce, ship, transport, or receive any toy, look-alike, or imitation firearm ("device") covered by this Part as set forth in s 1150.1 of this part unless such device contains, or has affixed to it, one of the markings set forth in s 1150.3 of this part, or unless this prohibition has been waived by s 1150.4 of this part.

s 1150.3 Approved markings.

The following markings are approved by the Secretary of Commerce:

(a) A blaze orange (Federal Standard 595a, February, 1987, color number 12199, issued by the General Services Administration) or orange color brighter than that specified by the federal standard color number, solid plug permanently affixed to the muzzle end of the barrel as an integral part of the entire device and recessed no more than 6 millimeters from the muzzle end of the barrel. This incorporation by reference was approved by the Director of the Federal Register in accordance with U.S.C. 552(a) and 1 CFR part 51. Copies of Federal Standard 595a may be obtained from the Office of Engineering and Technical Management, Chemical Technology Division, Paints Branch, General Services Administration, Washington, DC 20406. Copies may be inspected at the Office of the Associate Director for Industry and Standards, National Institute for Standards and Technology, Gaithers-

burg, Maryland, or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

(b) A blaze orange (Federal Standard 595a, February, 1987, color number 12199, issued by the General Services Administration) or orange color brighter than that specified by the Federal Standard color number, marking permanently affixed to the exterior surface of the barrel, covering the circumference of the barrel from the muzzle end for a depth of at least 6 millimeters. This incorporation by reference was approved by the Director for the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies of Federal Standard 595a may be obtained from the Office of Engineering and Technical Management, Chemical Technology Division, Paints Branch, General Services Administration, Washington, DC 20406. Copies may be inspected at the Office of the Associate Director for Industry and Standards, National Institute for Standards and Technology, Gaithersburg, Maryland, or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

(c) Construction of the device entirely of transparent or translucent materials which permits unmistakable observation of the device's complete contents.

(d) Coloration of the entire exterior surface of the device in white, bright red, bright orange, bright yellow, bright green, bright blue, bright pink, or bright purple, either singly or as the predominant color in combination with other colors in any pattern.

[57 FR 48454, Oct. 26, 1992]

s 1150.4 Waiver.

The prohibitions set forth in s 1150.2 of this part may be waived for any toy, look-alike or imitation firearm that will be used only in the theatrical, movie or television industries. A request for such a waiver should be made, in writing, to the Chief Counsel for Technology, United States Department of Commerce, Washington, DC 20230. The request must include

a sbe used only in the theatrical, movie or television industry. A sample of the item must be included with the request.

[57 FR 48454, Oct. 26, 1992]

s 1150.5 Preemption.

In accordance with section 4(g) of the Federal Energy Management Improvement Act of 1988 (15 U.S.C. 5001(g)), the provisions of section 4(a) of that Act and the provisions of this part supersede any provision of State or local laws or ordinances which provides for markings or identification inconsistent with the provisions of section 4 of that Act or the provisions of this part.

FEDERAL REGISTER / VOL. 57, NO. 207 / MONDAY OCTOBER 6, 1992 / RULES AND REGULATIONS

DEPARTMENT OF COMMERCE

Technology Administration

15 CFR Part 1150

[Docket No. 910931-2204]

RIN 0692-AA11

Marketing of Toy, Look-Alike, and Imitation Firearms

AGENCY: Technology Administration, Commerce.

ACTION: Final Rule.

SUMMARY: The Technology Administration of the United States Department of Commerce is today issuing a final rule to change regulations pertaining to marking requirements for toy, look-alike, and imitation firearms. These regulations were promulgated in May of 1989, and implement section 4 of the Federal Energy Management Improvement Act of 1988 ("Act") which prohibits the manufacturing, entering into commerce, shipping, transporting, or receipt of any toy, imitation, or look-alike firearm ("device") unless such device contains, or has affixed to it, a marking approved by the Secretary of Commerce. The Technology Administration published a notice of a proposed rulemaking to revise the regulations on November 7, 1991 (56 FR 56953). After consideration of public comments received in response to that proposed rulemaking, the Technology Administration is today promulgating this final rule amending the regulations. It sets out additional permissible markings, and further defines those devices covered by the regulation.

DATES: This rule is effective October 26, 1992.

FOR FURTHER INFORMATION CONTACT: Bradford C. Brown, Chief Counsel for Technology, telephone number (202) 482-1984, FAX (202) 482-0253.

SUPPLEMENTARY INFORMATION:

Background

On November 7, 1991 the Technology Administration published a Notice of Proposed Rulemaking in the Federal Register (56 FR 56953) announcing proposed revisions to regulations found at 15 CFR Part 1150, which implement section 4 of the Federal Energy Management Improvement Act of 1988, pertaining to the marking of toy, look-alike, and imitation firearms. The public comment period of 60 days was subsequently extended to March 17, 1992 in a Federal Register notice published on January 17, 1992 (57 FR 2065).

Section 4(a) of the Federal Energy Management Improvement Act of 1988 provides that it shall be unlawful for any person to manufacture, enter into commerce, ship, transport, or receive any toy, look-alike, or imitation firearm unless such firearm contains, or has affixed to it a marking approval by the Secretary of Commerce. (15 U.S.C. 5001(a)). Section 4(b)(1) of the Act establishes as an initial acceptable marking a permanently affixed, blaze orange plug inserted in the barrel of the toy, look-alike, or imitation firearm, recessed no more than 8 millimeters from the muzzle end of the barrel, and made an integral part of the device. (15 U.S.C. 5001(b)(1)). Section 4(b)(2) authorizes the Secretary to approve an alternative marking for any toy, look-alike, or imitation firearm not capable of being marked with the requisite blaze orange plug and to waive the marking requirements for any toy, look-alike, or imitation firearm that will only be used in the theatrical, movie or television industries. (15 U.S.C. 5001(b)(2)). Section 4(b)(3) authorizes the Secretary to adjust or charge the marking system established pursuant to sections 4(b)(1) and (2), after consultation with interested persons. (15 U.S.C. 5001(b)(3)).

In May of 1989 the Technology Administration promulgated a regulation found at 15 CFR part 1150, to implement the Act. That regulation maintained the blaze orange plug marking established by section 4(b)(1) of the Act and estab-

lished as an alternative marking system for water guns, air-soft guns, light emitting guns or other ejecting toy, look-alike, or imitation firearms which, as such, cannot be marked with a plug in the muzzle end of the barrel because it would restrict the opening necessary to discharge such things as water, non-metallic projectiles, and light, a blaze orange marking permanently affixed to the exterior surface of the barrel and covering the circumference of the barrel and extending from the muzzle end for a depth of at least 6 millimeters. Part 1150 also adjusted the statutory marking system by permitting three other methods of marking for use in the alternative irrespective of whether the device could be marked with the blaze orange plug or blaze orange muzzle marking. The three alternatives were to mark the device at manufacture by; (1) Constructing it entirely of transparent or translucent materials which permit unmistakable observation of the device's complete contents; (2) permanently coloring the entire exterior surface of the device bright red, bright orange, bright yellow, bright green, or bright blue, either singly or as the predominant color in combination with other colors in any pattern; or (3) permanently coloring the entire exterior surface of the device predominantly in white in combination with one or more of the colors bright red, bright orange, bright yellow, bright green, or bright blue in any pattern. These alternatives were selected because they represent standard industry practice for most toy, look-alike, and imitation firearms and, in the opinion of those consulted, are sufficient to identify the device as a toy, look-alike, or imitation firearm rather than as a real firearm.

Description and Explanation of Proposed Changes

The notice of proposed rulemaking published in November of 1991 proposed seven changes to 15 CFR part 1150.

First, § 1150.1 was proposed to be amended by restating the applicability of the regulation to include only those devices which had the "appearance, shape, and/or configuration of a firearm"; as originally promulgated, the regulation applied to

devices which had the "general appearance, shape, and/or configuration of a firearm." This change was proposed to remove ambiguity from the regulation. The work "toy" which appeared in line ten (10) of this section was deleted so as to conform with 15 U.S.C. 5001.

Second, a definition of "collector replica" was proposed in order to distinguish between replicas which were intended to be collectable reproductions and imitation firearms modelled after antique firearms but not intended to be used as collector replicas. The distinction was made because collector replicas are specifically exempted under the regulation whereas toy, lookalike, or imitation firearms which are not intended to be used as collector replicas must meet the requirements of the regulation.

Third, an exception was proposed in § 1150.1 to clarify that part 1150 was not applicable to "decorative, ornamental, and miniature objects having the appearance, shape and/of configuration of a firearm, including those intended to be displayed on a desk or worn on bracelets, necklaces, key chains, and so on, provided that the miniatures measure no more than thirty-eight (38) millimeters in height by seventy (70) millimeters in length." This change was proposed to remove certain imitation firearms from the coverage of the rule because they were so small in size that they could not be mistaken for real firearms. These particular dimensions were selected because the Technology Administration, after consulting with the Bureau of Alcohol, Tobacco and Firearms, was not able to identify any firearms of lesser size that were capable of functioning as a real gun. Metric units were used to conform with the Metric Conversion Act.

Fourth, changes were proposed to be made to § 1150.3(a) and (b) to allow the approved plug or marking at the muzzle end of the barrel to be either "blaze orange" (Federal Standard 595a. February, 1987, color number 12199, issued by the General Services Administration) or an orange color brighter than that specified by the Federal Standard color number. This change was proposed to prevent enforcement actions involv-

ing goods that had bright orange markings in keeping with the intent of the regulation, but did not meet the exact standard for "blaze orange" set forth in the regulation.

Fifth, a change was proposed to be made to § 1150.3(b) to remove the requirement that the imitation gun have an opening used to discharge water, nonmetallic projectiles, or light to get approval for a collar-type marking (§ 1150.3(b)). With the proposed change, whether or not the gun emitted light, water, etc., the collar-type marking could be used.

Sixth, several alternative markings were proposed to be added to the list of approved alternative markings, which included coloration of the entire exterior surface in white, bright pink or bright purple. These additional colors were deemed bright enough that their inclusion in the approved markings list was appropriate. The alternative markings provision was also clarified to include colorations of the entire surface singly or in combination with the approved colors. Deletion of § 1150.3(e) was proposed in order to eliminate redundancy.

Finally, an administrative mechanism for the processing of waiver requests was proposed to be added to § 1150.4 that waives part 1150 for any toy, look-alike, or imitation firearm to be used only in the theatrical, movie or television industries. The proposed mechanism was that requests for waivers be made, in writing, to the Chief Counsel for Technology, United States Department of Commerce, and that the request include a sworn affidavit which stated with specificity the factual circumstances, and that the toy, look-alike or imitation firearm was to be used only in the theatrical, movie or television industry. It was anticipated that such a statement would include the place of manufacture, and a discussion of the specific use and disposition of the items. As originally promulgated, part 1150 contained a "self-enforcing" waiver provision. This approach, however, had proven impractical, imports of noncompliant toy, look-alike, and imitation firearms were routinely prevented at the port of entry by the U.S. Customs Service.

The Technology Administration held a public meeting at the Greater Los Angeles World Trade Center on the proposed amendments and changes to the safety marking system for toy, look-alike, and imitation firearms on December 2, 1991 (56 FR 57869 Nov. 14, 1991). The meeting was attended by a number of representatives of trade associations, manufacturers, importers, distributors and Federal Agencies. Many attenders brought samples of toy, look-alike, or imitation firearms. Most of the pertinent comments made at this meeting are reflected in the written comments received in response to the notice of proposed rulemaking.

Analysis of Comments Received

In response to the November 7, 1991 Notice of Proposed Rulemaking the Technology Administration received comments from six manufacturers, vendors, or their representatives or attorneys. None of the commenters fully supported all of the proposed changes and each commenter made recommendations with respect to the proposed changes.

The four main comments regarding the proposed changes were first, the term "collector replica" was not properly defined; second, the miniature size requirements were too restrictive; third, the colors and coloration were not clearly defined and fourth, the waiver process was overly burdensome. The first and second issues were each raised by four commenters, the third issue by three commenters and the fourth issue by two commenters.

The fourth comments received on the "collector replica" definition in § 1150.1 took issue with toys being excluded from the definition. Their position was that the pre-1898 dated in 15 U.S.C. 5001(c) defined the term "collector replica" and that a toy modelled after any original firearm which was manufactured, designed, and produced prior to 1898 should also be exempted from the regulation. The statute, however, exempts only look-alike, nonfiring, collector replicas modelled on antique firearms developed prior to 1898 from the requirement and does not explicitly exempt toys,

look-alike, or imitation firearms that are not "collector replicas." Support for this interpretation of "collector replica" is present in the Congressional Record (134 Cong. Rec. H10072 (daily ed. October 11, 1988)) in which Congressman Moorhead states that the marking requirement would not apply to manufacturers who produced replicas which resemble pre-1898 firearms, "the realistic look of the object and whose expensive replicas are almost never involved in crimes or accidental shootings by the police." As a result of this clear statutory guidance and legislative history, the definition of "collector replica" in the final rule is adopted as proposed.

Four comments specifically addressed the miniature size exemption in § 1150.1(c). The toy manufacturers, importers, vendors and their representatives argued that the size limit of 38 millimeters in height by 70 millimeters in length was too narrow of an exemption. Their position was that the relative size of the miniature to the original gun size is key to the perception of a working firearm and that the measurements specified in the proposed changes were arbitrary. The 38 millimeter by 70 millimeter dimensions were selected because the Technology Administration, after consultation with the Bureau of Alcohol, Tobacco and Firearms, had not identified any firearms of lesser size that were capable of functioning as real guns. Arguments by the commenters addressing toy, look-alike, or imitation guns with stocks such as rifles, shot guns, and machine guns were also considered and since the stock is not part of the firing mechanism, language dealing with miniature guns with stocks has been added to the final rule. The term "miniatures" in line 7 of this section in the proposed rule has been changed to "objects" so that the applicability of this section to decorative and ornamental miniatures is clarified. The rest of the proposed changes to this section remain the same in the final rule.

The third class of comments received dealt with colors which appear in § 1150.3(c). One comment addressed the subjective "brightness" standard of the colors and two comments addressed the combination of the specified colors. The com-

menter who was concerned with the brightness standard suggested the use of pantone colors, which the commenter stated is the accepted coloring norm in almost every industry. He went on to explain that a list of acceptable shades or brighter shades for a particular color could be used as the standard. After considering these comments, the Technology Administration, however, believes that such an exact list of colors is too restrictive and that the subjective standard for bright used in this section allows for flexibility in enforcement of the regulation. The other concern expressed regarding color was that the proposed regulation provided for coloration of the device in the listed colors "either singly or in combinations of these colors in any pattern", thus restricting the colors to be used to only those enumerated in the regulation. The original regulations provided for coloration of the device in the listed colors "either singly or as the predominant color in combination with other colors in any pattern." It is the Technology Administration's opinion that having the device's surface predominantly colored in the listed colors is sufficient to distinguish a toy gun from a real gun. This change in the coloration policy of having the coloration be predominantly rather than only the approved listed colors is reflected in the final rule.

The fourth category of comments addressed the waiver process as provided for in § 1150.4. Two commenters argued that the detailed waiver procedure set forth in the proposed regulations could be required more than once for a particular item: that is, each time a person manufactured, entered into commerce, shipped, transported or received a look-alike firearm to be used in the theatrical, movie or television industry. It is, however, the Technology Administration's position that once a waiver has been provided and approved, this waiver would be sufficient for all levels of commerce. A second related issue argued by the commenters regarding this section of the proposed regulations was that the specific factual circumstances requirement for the items listed in the affidavit was overly burdensome. The specificity requirement has therefore been removed from the final regulation so that only

a general affidavit swearing to the fact that the toy, look-alike, or imitation firearm will be used only in the theatrical, movie or television industry is necessary.

Additional Information

The final rule sets out additional permissible markings, and further defines those devices covered by the regulation. Accordingly, since the rule thus grants or recognizes an exemption and relieves restrictions, under section 553(d) of the Administrative Procedure Act (5 U.S.C. 553(d)) it may and is being made effective without a 30-day delay in effective date.

Executive Order 12291

The Under Secretary for Technology has determined that this rule is not a major rule within the meaning of section 1(b) of Executive Order 12291 because it will not result in:

(1) An annual effect on the economy of $100 million or more;

(2) A major increase in costs or prices for consumers, individual industries, Federal, state or local government agencies or geographic regions; or

(3) Significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic or export markets.

Therefore, preparation of a Regulatory Impact Analysis is not required under Executive Order 12291.

Executive Order 12612

This rule does not contain policies with Federalism implications sufficient to warrant preparation of a Federalism assessment under Executive Order 12612.

Executive Order 12372

This rule does not involve Federal financial assistance, direct Federal development, or the payment of any matching funds from a state or local government. Accordingly, the requirements of Executive Order 12372 are not applicable to this rule.

Executive Order 12630

This rule does not pose significant takings implications within the meaning of Executive Order 12630.

Regulatory Flexibility Act

The General Counsel of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration when this rule was proposed that if the rule was adopted, it would not have a significant economic impact on a substantial number of small entities because the alternative markings conform to existing industry practices for most toy, look-alike, and imitation firearms, thus reducing the rule's impact to only where such practices are not followed. As a result, a Regulatory Flexibility Analysis was not required to be prepared under the Regulatory Flexibility Act.

Paperwork Reduction Act

This rule does not contain information collection requirements subject to the Paperwork Reduction Act.

National Environmental Policy Act

This rule will not significantly affect the quality of the human environment. Therefore, an environmental assessment or Environmental Impact Statement is not required to be prepared under the National Environment Policy Act of 1969.

List of Subjects in 15 CFR Part 1150

Commerce, Business and industry, Labeling, Hobbies, Imports, Exports, Shipping, Toys, Transportation, Freight, Incorporation by reference.

Dated: October 19, 1992

Robert M. White
Under Secretary for Technology

For reasons set forth in the preamble, title 15, subtitle B. chapter XI, part 1150 of the Code of Federal Regulations is amended as follows:

CHAPTER XI—TECHNOLOGY ADMINISTRATION, DEPARTMENT OF COMMERCE

PART 1150—MARKING OF TOY, LOOK-ALIKE AND IMITATION FIREARMS

1. The authority citation for part 1150 continues to read as follows:

Authority: Section 4 of the Federal Energy Management Improvement Act of 1983, 15 U.S.C. 5001.

2. Section 1150.1 is revised to read as follows:

§ 1150.1 Applicability

This part applies to toy, look-alike, and imitation firearms ("devices") having the appearance, shape, and/or configuration of a firearm and produced or manufactured and entered into commerce on or after May 5, 1989, included devices modelled on real firearms manufactured, designed, and produced since 1898. This part does not apply to:

(a) Non-firing collector replica antique firearms, which look authentic and may be a scale model but are not intended as toys modelled on real firearms designed, manufactured, and produced prior to 1898:

(b) Traditional B-B, paint-ball, or pellet-firing air guns that expel a projectile through the force of compressed air, compressed gas or mechanical spring action, or any combination thereof, as described in American Society for Testing and Materials standard F589-85, Standard Consumer Safety Specification for Non-Powder Guns, June 28, 1985. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from the American Society for Testing and Materials, 1916 Race Street, Philadelphia, PA 19103. Copies may be inspected at the office of the Associate Director for Industry and Standards, National Institute for Standards and Technology, Gaithersburg, Maryland, or at the Office of the Federal Register, 800 North Capitol Street, NW, suite 700, Washington, DC; and

(c) Decorative, ornamental, and miniature objects having the appearance, shape and/or configuration of a firearm, including those intended to be displayed on a desk or worn on bracelets, necklaces, key chains, and so on, provided that the objects measure no more than thirty-eight (38) millimeters in height by seventy (70) millimeters in length, the length measurement excluding any gun stock length measurement.

3. Section 1150.3 is amended by removing paragraph (e) and by revising paragraphs (a), (b), and (d) to read as follows:

§ 1150.3 Approved markings.

The following markings are approved by the Secretary of Commerce:

(a) A blaze orange (Federal Standard 595a, February, 1987, color number 12199, issued by the General Services Administration) or orange color brighter than that specified by the federal standard color number, solid plug permanently affixed to the muzzle end of the barrel as an integral part of the entire device and recessed no more than 6 millimeters from the muzzle end of the barrel. This incorporation by reference was approved by the Director of the Federal Register in accor-

dance with U.S.C. 552(a) and 1 CFR part 51. Copies of Federal Standard 595a may be obtained from the Office of Engineering and Technical Management, Chemical Technology Division, Paints Branch, General Services Administration, Washington, DC 20406. Copies may be inspected at the office of the Associate Director for Industry and Standards, National Institute for Standards and Technology, Gaithersburg, Maryland, or at the Office of the Federal Register, 800 North Capitol Street, NW, suite 700, Washington, DC.

(b) A blaze orange (Federal Standard 595a, February 1987, color number 12199, issued by the General Services Administration) or orange color brighter than that specified by the Federal Standard color number, marking permanently affixed to the exterior surface of the barrel, covering the circumference of the barrel from the muzzle end for a depth of at least 6 millimeters. This incorporation by reference was approved by the Director for the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR, part 51. Copies of Federal Standard 595a may be obtained from the Office of Engineering and Technical Management, Chemical Technology Division, Paints Branch, General Services Administration, Washington, DC 20406. Copies may be inspected at the office of the Associate Director for Industry and Standards, National Institute for Standards and Technology, Gaithersburg, Maryland, or at the Office of the Federal Register, 800 North Capitol Street, NW, suite 700, Washington, DC.

(c) * * *

(d) Coloration of the entire exterior surface of the device in white, bright red, bright orange, bright yellow, bright green, bright blue, bright pink, or bright purple, either singly or as the predominant color in combination with other colors in any pattern.

4. Section 1150.4 is revised to read as follows:

§ 1150.4 Waiver.

The prohibitions set forth in § 1150.2 of this part may be waived for any toy, look-alike or imitation firearm that will be used only in the theatrical, movie or television industries. A request for such a waiver should be made, in writing, to the Chief Counsel for Technology, United States Department of Commerce, Washington, DC 20230. The request must include a sworn affidavit which states that the toy, look-alike, or imitation firearm will be used only in the theatrical, movie or television industry. A sample of the item must be included with the request.

* * *

FEDERAL REGISTER / VOL. 54, NO. 86 / FRIDAY MAY 5, 1989

Technology Administration

15 CFR Part 1150

[Docket No. 90248-9104]

Marking of Toy, Look-Alike and Imitation Firearms

AGENCY: Technology Administration, Commerce.

ACTION: Final rule.

SUMMARY: The Technology Administration of the United States Department of Commerce is today issuing a final rule to implement section 4 of the Federal Energy Management Improvement Act of 1988 ("Act") (Pub. L. 100-815) which prohibits the manufacturing, transporting, or receipt of any toy, imitation or look-alike firearm ("device") unless such device contains, or has affixed to it, a marking approved by the Secretary of Commerce. The final rule maintains the method of marking established by section 4(b)(1) of the Act and establishes an alternative method of marking when a device is not capable of being marked by the method established by section 4(b)(1) and three alternative methods of marking which may be used in all instances. In addition, the

rule waives marking requirements for any toy, look-alike, or imitation firearm that will be used only in the theatrical, movie, or television industries.

DATE: This rule is effective May 5, 1989. The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of May 5, 1989.

FOR FURTHER INFORMATION CONTACT: Dr. Stanley I. Warshaw, Associate Director for Industry and Standards, National Institute of Standards and Technology, telephone number (301) 975-4000, FAX (301) 926-0647.

SUPPLEMENTARY INFORMATION: Section 4(a) of the Federal Energy Management Improvement Act of 1988 provides that "it shall be unlawful for any person to manufacture, enter into commerce, ship, transport, or receive any toy, look-alike, or imitation firearm unless such firearm contains, or has affixed to it, a marking approved by the Secretary of Commerce * * *" (15 U.S.C. 5001(a).) Section 4(b)(1) of the Act establishes as an initial acceptable marking a permanently affixed, blaze orange plug inserted in the barrel of the toy, look-alike, or imitation firearm, recessed no more than 6 millimeters from the muzzle end of the barrel, and made an integral part of the device. (15 U.S.C. 5001(b)(1).) Section 4(b)(2) authorizes the Secretary to approve an alternative marking for any toy, look-alike, or imitation firearm not capable of being marked with the requisite blaze orange plug, and to waive the marking requirements for any toy, look-alike, or imitation firearm that will only be used in the theatrical, movie, or television industries. (15 U.S.C. 5001(b)(2).) Section 4(b)(3) authorizes the Secretary to adjust or change the marking system established pursuant to sections 4(b)(1) and (2), after consultation with interested persons. (15 U.S.C. 5001(b)(3).)

The Technology Administration held a public workshop at the National Institute of Standards and Technology on February 9, 1989, on the marking requirements of the Act. (See 53

FR 50987, Dec. 19, 1988.) The workshop was attended by forty representatives of trade associations, manufacturers, importers, distributors and Federal Agencies. Many attendees brought samples of toy, look-alike or imitation firearms. Although not requested, written comments were received in advance and subsequent to the workshop.

Based on the comments received and consultations at the workshop and elsewhere with trade associations, manufacturers, importers, distributors, retailers, police chiefs, and Federal Agencies, the Under Secretary for Technology published a Notice of Proposed Rulemaking in the Federal Register on March 14, 1989 (54 FR 10550). The notice proposed to maintain the blaze orange plug marking established by section 4(b)(1) of the Act and establish as an alternative marking system for water guns, air-soft guns, light emitting guns or other ejecting toy, look-alike or imitation firearms which, as such, cannot be marked with a plug in the muzzle end of the barrel because it would restrict the opening necessary to discharge such things as water, non-metallic projectiles, and light, a blaze orange marking permanently affixed to the exterior surface of the barrel and covering the circumference of the barrel and extending from the muzzle end for a depth of at least 6 millimeters. The notice also proposed to adjust the statutory marking system by permitting three other methods of marking for use in the alternative irrespective of whether the device could be marked with the blaze orange plug or blaze orange muzzle marking. The three alternatives proposed were to mark the device at manufacture by:

(1) Constructing it entirely of transparent or translucent materials which permit unmistakable observation of the device's complete contents; (2) permanently coloring the entire exterior surface of the device bright red, bright orange, bright, yellow, bright green, or bright blue either singly or as the predominant color in combination with other colors in any pattern; or (3) permanently coloring the entire exterior surface of the device predominantly in white in combination with one or more of the colors bright red, bright orange, bright, yellow,

bright green, or bright blue in any pattern. These alternatives were selected because they represent standard industry practice for most toy, look-alike and imitation firearms and in the opinion of those consulted, are sufficient to identify the device as a toy, look-alike or imitation firearm rather than as a real firearm. Finally, the notice proposed to waive marking requirements for any toy, look-alike or imitation firearm that will only be used in the theatrical, movie or television industries.

Section 4(c) of the Act specifically excludes from the Act's marking requirements or any marking requirements or any marking requirements established thereunder look-alike, non-firing, collector replicas of antique firearms designed, manufactured, and produced prior to 1898, and traditional B-B, paint-ball, or pellet-firing air guns that expel a projectile through the force of air pressure. (15 U.S.C. 5001(c).) However, it is clear from the legislative history of section 4 that it was the intent of Congress to also exclude from marking requirements traditional B-B, piant-ball, and pellet-firing air guns that expel a projectile through the force of compressed gas or mechanical spring action, or a combination thereof. Accordingly, the notice proposed to exclude from marking requirements look-alike, non-firing, collector replicas of antique firearms designed, manufactured, and produced prior to 1898, and traditional B-B, paint-ball, or pellet-firing air guns that expel a projectile through the force of compressed air, compressed gas or mechanical spring action, or any combination thereof.

In response to the March 14, 1989 Notice of Proposed Rulemaking, the Technology Administration received twenty-eight comments, five from manufacturers, vendors, or their representatives or attorneys; ten from police officials at various levels of government; four from State legislators and executive officials; seven from interested members of the public; and two from elements of the U.S. Government. Eight of the commenters fully supported the regulation, thirteen supported the regulation but recommended changes, four took

the position that a total ban on realistic toy guns was necessary and therefore opposed the regulation as too weak, and three took no position.

The two most frequent comments about the regulation were, first, that the marking requirements should be changed to eliminate the recessed orange plug as an acceptable marking, and second, that a complete ban on realistic toy guns was needed. Eight commenters raised the first issue and five raised the second. No changes are being made to the regulations at this time as a result of either comment. The Technology Administration is awaiting the results of a study by the Director of the National Institute of Justice, mandated by section 4(e) of the Act, before deciding whether to remove the recessed orange plug as an acceptable marking. That study is a technical evaluation of the marking system established by the Act and of the alternative marking systems being implemented by this regulation. The Act requires that study to be completed within nine months of enactment, or no later than August 5, 1989. With respect to the comments requesting a complete ban on realistic toy guns, the Secretary of Commerce has no authority under the Act to take such action.

Other comments received are described below, listed by commenter. Among the five manufacturers, vendors, and their representatives, all generally supported the methods of marking contained in the proposed regulation. However, three requested changes in § 1150.1 "Applicability" of the regulation to make clear the intent of Congress that the regulation did not apply to toy, look-alike or imitation firearms that are non-firing replicas of an antique firearm modeled on a real firearm designed, manufactured, and produced prior to 1989. The final regulation has been revised to accommodate this request. One commenter requested an exemption from the regulations for airguns and look-alike guns marketed to the adult buyer; another commenter requested that section 1150.5, dealing with preemption of marking requirements by state and local governments, be strengthened. These requested changes have not been made, because the Secretary of Commerce has no authority under the Act to make the requested changes.

Among the ten police officials, all generally supported the proposed regulation, although as discussed above, six of the ten questioned the effectiveness of a recessed orange plug without additional marking. In addition, five of the ten commenters suggested the inclusion of BB guns and the like under the scope of the regulation. Because the exclusion of BB guns is statutorily mandated by section 4(c) of the Act, the requested change was not made.

Four comments were received from representatives of state governments, three supporting the regulation and one opposing it. The Consumer Protection Board of one state fully supported the regulation, as did the Department of Human Resources of a second state. The Consumer Council of a state Department of Agriculture supported the alternative marking schemes, but questioned the utility of the recessed blaze orange plug, recommending elimination of that method of marking. One state Senator opposed the regulation, strongly supporting in its place a total ban on toy guns and look-alikes.

Seven comments were received from the general public, four generally supporting the regulation and three preferring a total ban on toy guns and look alikes. Finally, materials were received from Senator Cranston of California and the National Institute of Justice, neither of which specifically commented on the regulation.

The final rule repeats the blaze orange plug method of marking established by the Act and repeats the preemption set forth in the statute. In all other respects it grants waivers and allows less restrictive methods of marking. Accordingly, since the rule thus grants or recognizes an exemption and relieves restrictions, under section 553(d) of the Administrative Procedure Act (5 U.S.C. 553(d)) it may and is being made effective without a 30 day delay in effective date.

FEDERAL REGISTER / VOL. 54, NO. 86 / FRIDAY MAY 5, 1989 / RULES AND REGULATIONS

CHAPTER XI—TECHNOLOGY ADMINISTRATION, DEPARTMENT OF COMMERCE

PART 1150—MARKING OF TOY, LOOK-ALIKE AND IMITATION FIREARMS

Sec.

1150.1 Applicability.
1150.2 Prohibitions.
1150.3 Approved markings.
1150.4 Waiver.
1150.5 Preemption.

Authority: Section 4 of the Federal Energy Management Improvement Act of 1966, 15 U.S.C. 5001.

§ 1150.1 Applicability.

This part applies to toy, look-alike and imitation firearms ("devices") having the general appearance, shape, and/or configuration of a firearm and produced or manufactured and entered into commerce on or after May 5, 1989, including devices modelled on real firearms manufactured, designed, and produced since 1896. This part does not apply to any toy, look-alike, or imitation firearm that is a non-firing replica of an antique firearm modelled on a real firearm designed, manufactured, and produced prior to 1898, nor to traditional B-B, paint-ball, or pellet-firing air guns that expel a projectile through the force of compressed air, compressed gas or mechanical spring action, or any combination thereof, as described in American Society for Testing and Materials standard F 589-85, *Standard Consumer Safety Specification for Non-Powder Guns*, June 28, 1985. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR Part 51. Copies may be obtained from the American Society for Testing and Materials, 1916 Race Street, Philadelphia, Pa. 19103.

Copies may be inspected at the office of the Associate Director for Industry and Standards, National Institute for Standards and Technology, Gaithersburg, Maryland, or at the Office of the Federal Register, 1100 L Street, NW, Room 8401, Washington, DC.

§ 1150.2 Prohibitions.

No person shall manufacture, enter into commerce, ship, transport, or receive any toy, look-alike, or imitation firearm ("device") covered by this Part as set forth in § 1150.1 of this part unless such device contains, or has affixed to it, one of the markings set forth in § 1150.3 of this part, or unless this prohibition has been waived by § 1150.4 of this part.

§ 1150.3 Approved markings.

The following markings are approved by the Secretary of Commerce:

(a) A blaze orange (*Federal Standard 595a, February, 1987, color number 12198*, issued by the General Services Administration) solid plug permanently affixed to the muzzle end of the barrel as an integral part of the entire device and recessed no more than 6 millimeters from the muzzle end of the barrel. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR Part 51. Copies of Federal Standard 595a may be obtained from the Office of Engineering and Technical Management, Chemical Technology Division, Paints Branch, General Services Administration, Washington DC 20406. Copies may be inspected at the office of the Associate Director for Industry and Standards, National Institute for Standards and Technology, Gaithersburg, Maryland, or at the Office of the Federal Register, 1100 L Street, NW, Room 8401, Washington DC.

(b) For any water gun, air-soft gun, light-emitting gun or other ejecting toy, look-alike or imitation firearm having an opening to discharge such things as water, non-metallic pro-

jectiles, and light, a blaze orange (*Federal Standard 595a, February, 1987, color number 12199*, issued by the General Services Administration) marking permanently affixed to the exterior surface of the barrel, covering the circumference of the barrel from the muzzle end for a depth of at least 6 millimeters. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR Part 51. Copies of Federal Standard 595a may be obtained from the Office of Engineering and Technical Management, Chemical Technology Division, Paints Branch, General Services Administration, Washington, DC 20406. Copies may be inspected at the office of the Associate Director for Industry and Standards, National Institute for Standards and Technology, Gaithersburg, Maryland, or at the Office of the Federal Register, 1100 L Street, NW, Room 8401, Washington, DC.

(c) Construction of the device entirely of transparent or translucent materials which permits unmistakable observation of the device's complete contents.

(d) Coloration of the entire exterior surface of the device in bright red, bright orange, bright yellow, bright green, or bright blue, either singly or as the predominant color in combination with other colors in any pattern.

(e) Coloration of the entire exterior surface of the device predominantly in white in combination with one or more of the colors bright red, bright orange, bright yellow, bright green, or bright blue in any pattern.

§ 1150.4 Waiver.

The prohibitions set forth in § 1150.2 of this part are waived for any toy, look-alike or imitation firearm that will be used only in the theatrical, movie or television industries.

§ 1150.5 Preemption.

In accordance with section 4(g) of the Federal Energy Management Improvement Act of 1988 (15 U.S.C. 5001(g)), the

provisions of section 4(a) of that Act and the provisions of this part supersede any provision of State or local laws or ordinances which provides for markings or identification inconsistent with the provisions of section 4 of that Act or the provisions of this part.

(g) To possess or carry any instrument or device to discharge or emit such gas or liquid ..... Five dollars

f. Violations. Except as is otherwise specifically provided in this section, any person who shall wilfully violate any of the provisions of this section shall, upon conviction, be punished by a fine of not more than fifty dollars, or by imprisonment not exceeding thirty days, or by both such fine and imprisonment.

g. It shall be unlawful for any person to sell or offer for sale, possess or use or attempt to use or give away, any toy or imitation pistol or revolver which substantially duplicates an actual pistol or revolver, unless said imitation or toy pistol or revolver shall be colored in colors other than black, blue, silver or aluminum, and further provided that the barrel of said toy or imitation pistol or revolver shall be closed with the same material of which the toy or imitation pistol or revolver is made for a distance of not less than one-half inch from the front end of said barrel. However, the possession or display of such instrument by a manufacturer or dealer, shall not be a violation of this section if sale is accompanied by delivery to a point without the city, and possession for such purpose by a manufacturer or dealer shall not be unlawful. Every such toy or imitation pistol or revolver hereinafter manufactured, distributed, transported or sold shall have legibly stamped thereon, the name of the manufacturer or some trade name, mark or brand by which the manufacturer can be readily identified.

However, possession or use of any toy or imitation pistol or revolver shall not be a violation of this section, where such possession or use is for or in the production of television programs or theatrical or motion picture presentations.

Any person who shall violate this subdivision shall be guilty of a misdemeanor, punishable by a fine of not more than one thousand dollars ($1,000) or imprisonment not exceeding one (1) year, or both.